

No. 96-1037

Supreme Court, U.S.

FILED

AUG 22 1997

CLERK

(9)

In the
Supreme Court of the United States
October Term, 1997

KIOWA TRIBE OF OKLAHOMA,

Petitioner,

v.

MANUFACTURING TECHNOLOGIES, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS,
DIVISION I, FOR THE STATE OF OKLAHOMA

**BRIEF OF AMICUS CURIAE FOND DU LAC
BAND OF LAKE SUPERIOR CHIPPEWA
IN SUPPORT OF PETITIONER**

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INTEREST OF AMICUS*

The Fond du Lac Band of Lake Superior Chippewa is a federally recognized Indian tribe which occupies the Fond du Lac Reservation in northeastern Minnesota pursuant to the

* Pursuant to rule 37.6 of the Rules of this Court, counsel for amicus states that no counsel for any party authored this brief in whole or part, and that no person or entity other than amicus and its counsel made any monetary contribution to the preparation and submission of this brief.

Treaty of LaPointe, 10 Stat. 1109. The Fond du Lac Band administers a variety of programs for Band members and other Indians in the Band's service area, including the operation of educational, housing and health care facilities,¹ and also operates several businesses, including two gaming establishments,² a hotel, and a construction company. The Band operates a health clinic, a group home and a tribal college off of the Reservation. In addition, the Band maintains a comprehensive conservation and natural resource management program in connection with its exercise of hunting, fishing and gathering rights under the treaties of 1837³ and 1854,⁴ much of which is federally-funded. *Fond du Lac Band of Chippewa v. Carlson*, Civ. No. 5-92-159 (D. Minn. March 18, 1996), *appeal pending*, Nos. 97-1757 et al. (8th Cir. 1997).⁵ The

¹ The Band's educational program is funded by the United States pursuant to the Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. § 450 *et seq.*, and the Tribally-Controlled Community College Act of 1978, 25 U.S.C. § 1801 *et seq.*; the Band's health care program is funded by the United States pursuant to the Indian Health Care Improvement Act of 1976, 25 U.S.C. § 1601 *et seq.*; and the Band's housing program is funded pursuant to the Native American Housing Assistance and Self-Determination Act of 1996, Pub. L. 104-330, 110 Stat. 4017, to be codified at 25 U.S.C. § 4101 *et seq.*

² One of the Band's casinos, the Fond-du-Luth Casino, is operated on tribal trust land in downtown Duluth, Minnesota (approximately 25 miles northeast of the original Reservation) pursuant to a Tribal-City accord between the Band and the City, under which the City receives 30 percent of the net revenues of the Casino.

³ Treaty of July 29, 1837, 7 Stat. 536.

⁴ Treaty of September 30, 1854, 10 Stat. 1109 (Treaty of LaPointe).

⁵ Under the 1837 and 1854 treaties, the Fond du Lac Band has reserved harvest rights over some 8 million acres of land, from east-central Minnesota to the Canadian border. The harvest activities of Band members are exempt from state law only to the extent to which the Band itself maintains an effective system of self-regulation, which naturally requires an extensive regulatory and enforcement presence in those off-

common purposes of these operations is to improve the quality of life for Band members and to promote the continuity and self-determination of the Band as a whole.

The Fond du Lac Band has an interest in this case because every government program and enterprise operated by the Band engages in contractual relations involving some degree of off-reservation performance. The Band routinely enters into contracts with a variety of off-reservation vendors, contractors and consultants in its day-to-day operations. The maintenance of tribal autonomy in the modern world -- which has been the essence of federal Indian policy for three decades -- necessitates such interaction. An erosion of the tribal sovereign immunity doctrine in this case would expose tribes to unlimited litigation in alien forums which would sap the tribal resources necessary to the fulfillment of that purpose. The Band accordingly files this brief to urge this Court to uphold its earlier decisions regarding the nature and scope of tribal sovereign immunity and to hold that the Oklahoma courts are federally preempted from finding an implicit waiver of tribal immunity under Oklahoma state law.

Both parties have consented to the filing of this brief *amicus curiae*, and those consents have been lodged with the Clerk.

SUMMARY OF ARGUMENT

The Oklahoma Court of Appeals has in this case erroneously resolved an issue of tribal sovereign immunity

reservation areas. *Fond du Lac Band v. Carlson*, slip op. at 25-29 (citing *United States v. Michigan*, 653 F.2d 277, 279 (6th Cir. 1981); *Mille Lacs Band of Chippewa v. State of Minnesota*, 861 F. Supp. 784, 838-39 (D. Minn. 1994); *Lac Courte Oreilles Band of Indians v. Wisconsin*, 668 F. Supp. 1233, 1241-42 (D. Wis. 1987)).

under Oklahoma state law, and has further erred by holding that the sovereign immunity of the Kiowa Tribe does not bar state jurisdiction over a breach of contract action against the Tribe arising off of tribal territory. Issues involving tribal sovereign immunity are the exclusive province of federal law, and numerous precedents of this Court provide that tribal sovereign immunity cannot be waived by implication, but only through the express and unequivocal consent to suit by Congress or by the tribe itself.

The primary state precedent relied upon by the Oklahoma Court of Appeals in this matter, *Hoover v. Kiowa Tribe of Oklahoma*, 909 P.2d 59 (Okla. 1995), *cert. denied*, ___ U.S. ___, 116 S.Ct. 1675 (1996), has mistakenly applied the precedent of *Nevada v. Hall*, 440 U.S. 410 (1979) in arriving at the conclusion that state court accommodation of tribal sovereign immunity is a discretionary function of comity. *Nevada v. Hall* is inapposite to this matter because that decision involved an issue of sovereign immunity arising between two states. Tribes are not states, and unlike the issue of state immunity in *Nevada v. Hall*, there is a constitutional barrier to the resolution of tribal immunity issues under state law. Indeed, Oklahoma consented to exclusive federal authority over Indian affairs upon achieving statehood.

The precedents of this Court and of the lower federal courts support the application of the tribal immunity doctrine in off-reservation and contractual contexts. The decisions of this Court regarding tribal immunity have without exception focused on the sovereign status of the tribes and on the federal trust responsibility to preserve tribal assets rather than on the situs of the claim. In *Puyallup Tribe, Inc. v. Department of Game*, 433 U.S. 165, 172-73 (1977), tribal immunity was recognized as a barrier to state jurisdiction over tribal fishing activities off-reservation, and in *Oklahoma Tax Commission*

v. Citizen Band Potawatomi Indian Tribe, 498 U.S. 505, 509-11 (1991), this Court held that tribal immunity bars an action for monetary damages against a tribe. The courts of at least five federal circuits have accordingly recognized tribal sovereign immunity as a jurisdictional barrier in contractual and off-reservation contexts.

As a policy matter, the federal objectives of promoting tribal self-determination and economic development would be seriously hampered by a restriction of the availability of tribal immunity to matters arising exclusively on tribal territory. The ability of tribes as sovereigns to conduct business dealings with parties outside of tribal territory is essential to the maintenance of a meaningful degree of tribal autonomy and self-determination. Without the benefit of immunity, the tribes would be faced with the impossible choice of limiting tribal activity to tribal territory or capitulating to state authority over tribal interests whenever potential claims can be pleaded in off-reservation facts. Either alternative would undermine the federal purposes of protecting the continuity of tribes as separate peoples.

As a practical matter, the issue of whether tribal sovereign immunity is to be waived in connection with the rights or remedies of a party to a commercial arrangement with a tribe is more appropriately addressed in the negotiation and formulation of the particular contract at issue. Indian law is a specialized area, but it is accessible, and there should be no surprises for a party entering into a transaction with reasonable preparation and adequate legal counsel. The immunity issue in the present case would have been effectively dealt with by an express waiver in the contract documents.

ARGUMENT

I. DETERMINATIONS REGARDING THE NATURE AND SCOPE OF TRIBAL SOVEREIGN IMMUNITY ARE A FUNCTION OF FEDERAL, NOT STATE, LAW.

The Oklahoma Court of Appeals in this case held that the state courts of Oklahoma have jurisdiction to hear a breach of contract action against the Kiowa Tribe, despite the absence of an express waiver of tribal sovereign immunity by the Tribe or a consent to suit by Congress, because (1) under Oklahoma state law such actions could be brought against the Oklahoma state government, (2) Congress has not expressly prohibited suit against tribes, and (3) the action does not infringe upon tribal self-government. Pet. App. 3 (citing *Hoover v. Kiowa Tribe*, 909 P.2d 59, 62 (Okla. 1995), cert. denied, ___ U.S. ___, 116 S.Ct. 1675 (1996)).⁶ In effect, the Court of Appeals

⁶ The Oklahoma Supreme Court in *Hoover v. Kiowa Tribe* cited the New Mexico Supreme Court's decision in *Padilla v. Pueblo of Acoma*, 754 P.2d 845 (N.M. 1988), cert. denied, 490 U.S. 1029 (1989), and both decisions relied upon this Court's decision in *Nevada v. Hall*, 440 U.S. 410 (1979), that the recognition of the sovereign immunity of one state by another is a function of comity. *Hoover*, 909 P.2d at 62; *Padilla*, 754 P.2d at 850-51. See also *Aircraft Equip. Co. v. Kiowa Tribe of Oklahoma*, No. 86,184 (Okla. May 6, 1997)(following *Hoover* in upholding state court seizure of tribal tax revenues in satisfaction of judgment); *Aircraft Equip. Co. v. Kiowa Tribe of Oklahoma*, 921 P.2d 359, 361 (Okla. 1996)(following *Hoover* in applying state law to tribal immunity defense); and *First Nat'l Bank in Altus v. Kiowa, Comanche and Apache Intertribal Land Use Comm.*, 913 P.2d 299, 301 (Okla. 1996)(following *Hoover* in rejecting tribal immunity as a jurisdictional defense).

The *Padilla* decision is clearly contrary to the weight of federal law. See, e.g., *In re Greene*, 980 F.2d 590, 593-95 (9th Cir. 1993), cert.

made the determination of tribal sovereign immunity a function of state law, found an implicit waiver of tribal immunity by virtue of the fact that the contract at issue was performed in part off of the Kiowa Reservation, and disregarded both the express reservation of tribal rights in the contract at issue and the preemptive effect of federal law and policy in this matter.

This Court has long recognized that Indian tribes possess the same degree of inherent⁷ common law immunity from suit as does the United States itself.⁸ See, e.g., *Oklahoma Tax*

denied sub nom., Richardson v. Mt. Adams Furniture, 510 U.S. 1039 (1994)(*Padilla* itself recognizes that "[a]bsent federal authorization, tribal immunity is privileged from diminution by the states," 754 P.2d at 847, but then erroneously assesses the scope of tribal immunity under state rather than federal law); *Elliot v. Capitol International Bank & Trust, Ltd.*, 870 F. Supp. 733, 734 (E.D. Tex. 1994), aff'd, 102 F.3d 549 (5th Cir. 1996)(“the *Padilla* approach is generally rejected outside of the courts of that state”); and Note, *Sovereign Immunity – Indian Tribal Sovereignty – Tribes Not Immune From Suits Arising From Off-Reservation Business Activity – Padilla v. Pueblo of Acoma*, 102 Harv. L. Rev. 556, 562 (1988)(“The [*Padilla*] court's application of *Nevada v. Hall* to Indian tribes is not only a simplistic and unsound extension of precedent, but also a misguided and dangerous encroachment on tribal sovereignty”).

⁷ An important feature of tribal sovereign immunity is the fact that it is not granted by the United States, but rather is a *retained* attribute of the preconstitutional sovereign status of a tribe. See, e.g., *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978); *United States v. Wheeler*, 435 U.S. 313, 322 (1978)). “[T]he treaty was not a grant of rights to the Indians, but a grant of rights from them -- a reservation of those not granted.” *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 680 (1979)(quoting *United States v. Winans*, 198 U.S. 371, 381 (1908)).

⁸ Consider, e.g., that the primary statutory vehicle providing for federal funding of tribal programs, the Indian Self-Determination and Education Assistance Act of 1975, contains an express retention of tribal sovereign immunity. See 25 U.S.C. § 450n (“Nothing in this Act shall be construed as ... affecting, modifying, diminishing, or otherwise impairing the sovereign immunity from suit enjoyed by an Indian tribe.”).

Commission v. Citizen Band Potawatomi Indian Tribe, 498 U.S. 505, 509-10 (1991); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978); *Bryan v. Itasca County*, 426 U.S. 373, 383-90 (1976); *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 512 (1940); *Turner v. United States*, 248 U.S. 354, 358 (1919). Federal court adherence to the tribal immunity doctrine is intended to conserve tribal assets necessary to achieve the federal policy objectives of tribal self-determination and economic self-sufficiency. See, e.g., *Citizen Band Potawatomi*, *supra*; *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering Co.*, 476 U.S. 877, 890-91 (1986); *American Indian Agricultural Consortium v. Standing Rock Sioux Tribe*, 780 F.2d 1374, 1378 (8th Cir. 1985); F. Cohen, *Handbook of Federal Indian Law* 324-28 (1982 ed.); Note, *In Defense of Tribal Sovereign Immunity*, 95 Harv. L. Rev. 1058, 1072-73 (1982).⁹ "If tribal assets could be dissipated by litigation, the efforts of the

⁹ The federal policy objectives of promoting tribal economic development and self-determination have been characterized by this Court as being of an "overriding" nature. See, e.g., *Citizen Band Potawatomi*, *supra*, 498 U.S. at 510; *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 216-17 (1987); *Iowa Mutual Insurance Co. v. LaPlante*, 480 U.S. 9, 14 & n. 5 (1987); *Three Affiliated Tribes*, *supra*, 476 U.S. at 890; *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 334-35 (1983); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143-44 & n. 10 (1980). Federal statutes declaring tribal self-government and economic development to be national policy objectives include the Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. § 450 *et seq.*; the Indian Reorganization Act of 1934, 25 U.S.C. § 461 *et seq.*; the Indian Civil Rights Act of 1968, 25 U.S.C. § 1301 *et seq.*; the Indian Financing Act of 1974, 25 U.S.C. § 1451 *et seq.*; the Indian Child Welfare Act of 1978, 25 U.S.C. § 1901 *et seq.*; the Indian Gaming Regulatory Act of 1988, 25 U.S.C. § 2701 *et seq.*; the Indian Tribal Justice Act of 1993, 25 U.S.C. § 3601 *et seq.*; the Native American Housing Assistance and Self-Determination Act of 1996, Pub. L. 104-330, 110 Stat. 4017, to be codified at 25 U.S.C. § 4101 *et seq.*; and the Indian Tribal Government Tax Status Act of 1982, 26 U.S.C. § 7871.

United States to provide the tribes with economic and political autonomy could be frustrated." *Cogo v. Central Council of the Tlingit and Haida Indians*, 465 F. Supp. 1286, 1288 (D. Alaska 1979).

Tribal sovereign immunity cannot be waived by implication, but can only be waived through express consent to suit by Congress or by the tribe itself. See, e.g., *Citizen Band Potawatomi*, *supra*; *Puyallup Tribe*, *supra*, 433 U.S. at 172-73; *United States Fidelity*, *supra*, 309 U.S. at 512-13. "[A] waiver of sovereign immunity 'cannot be implied but must be unequivocally expressed,'" and waivers must be strictly construed in favor of tribal interests. *Santa Clara Pueblo*, *supra* (quoting *United States v. Testan*, 424 U.S. 392, 399 (1976)). "Absent an effective waiver or consent, it is settled that a state court may not exercise jurisdiction over a recognized Indian tribe." *Puyallup Tribe*, *supra*, 433 U.S. at 172.

Issues of tribal sovereign immunity, like other aspects of Indian law, lie within the exclusive authority of the United States, and cannot be resolved by reference to state law. See generally *Montana v. Blackfeet Tribe*, 471 U.S. 759, 764 (1985); *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 671 (1974); *United States v. Forty-Three Gallons of Whiskey*, 93 U.S. 188, 195 (1876); and *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 561 (1832) (Indian affairs are the exclusive province of the federal government).

In this case, the Oklahoma Court of Appeals has found tribal immunity to be waived not by consent to suit but by the fact that the claims against the Tribe were pleaded in an off-reservation context. This amounts to an implicit waiver which, if upheld by this Court, would expose all Indian tribes to potential state court litigation in virtually any commercial matter which is not strictly intramural to a tribe and

geographically limited to a tribe's reservation. Such a result would have a tremendous chilling effect upon tribal economic development and self-determination.

The Oklahoma courts, like the New Mexico Supreme Court in the *Padilla* case, have avoided the authority of federal law governing tribal sovereign immunity by analogical reference to the interstate immunity issue addressed by this Court in *Nevada v. Hall*, 440 U.S. 410 (1979). *See Hoover v. Kiowa Tribe*, 909 P.2d 59, 62 (Okla. 1995), *cert. denied*, ___ U.S. ___, 116 S.Ct. 1675 (1996); *Padilla v. Pueblo of Acoma*, 754 P.2d 845 (N.M. 1988), *cert. denied*, 490 U.S. 1029 (1989). *Nevada v. Hall* held that, because the federal Constitution imposes no requirement for one state to recognize the immunity of another state, the forum state must decide for itself whether, and under what conditions, it will give effect to the immunity of a sister state in its courts. *Id.*, 440 U.S. at 418-27.

However, the rationale of *Nevada v. Hall* is inapposite to issues involving state recognition of tribal sovereign immunity. The tribes are not parties to the Constitution, and they are not states, but are domestic dependent nations towards which each state delegated exclusive authority to the federal government upon entering the Union. *See also Blatchford v. Native Village of Noatak*, 501 U.S. 775, 781-82 (1991)(the mutuality of concession under the Constitution that surrenders state immunity from suit by a sister state is not applicable to tribes, "as it would be absurd to suggest that tribes surrendered immunity in a convention to which they were not even parties"); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 (1980)(tribes "are not States, and the differences in the form and nature of their sovereignty make it treacherous to import" by analogy the constitutional principles affecting one to the other). More to the point,

because the tribal immunity doctrine is a creature of federal common law, it can only be restated by the United States itself and, to date, Congress has rarely limited the availability of tribal immunity.¹⁰ This Court specifically held, in *Tiger v. Western Investment Co.*, 221 U.S. 286 (1911), that "[i]n passing the enabling act for the admission of Oklahoma ... Congress was careful to preserve the authority of the United States over the Indians, their lands and property, which it had prior to the passage of the act." *Id.*, 221 U.S. at 309. If there are to be any changes of the tribal immunity doctrine, Congress should be the forum within which a focused and deliberate review of the policy can be undertaken, involving the appropriate consultation with the tribes.

II. THE PRECEDENTS OF THIS COURT AND OF THE LOWER FEDERAL COURTS SUPPORT THE APPLICABILITY OF TRIBAL IMMUNITY TO A BREACH OF CONTRACT ACTION ARISING OFF-RESERVATION.

¹⁰ *E.g.*, under Section 17 of the Indian Reorganization Act of 1934, 25 U.S.C. § 477, and the Oklahoma Indian Welfare Act of 1936, 25 U.S.C. § 503, Congress has permitted tribes to adopt corporate charters whose "sue and be sued" clauses have been interpreted by some federal courts as consents to suit. *See, e.g., Weeks Construction, Inc. v. Oglala Sioux Housing Authority*, 797 F.2d 669, 671, 673-74 (8th Cir. 1986)(holding that a "sue and be sued" clause in tribal housing authority charter constitutes consent to suit, but deferring to tribal court forum out of comity). *See also* Section 102 of the Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. § 450ff(c)(3)(A)(prohibiting availability of tribal sovereign immunity as a defense by insurers under liability insurance policies obtained by the Secretary of the Interior to provide coverage to tribes under the Federal Torts Claims Act for claims arising out of tribal administration of federally-funded programs).

The precedents of this Court addressing tribal sovereign immunity support the applicability of tribal immunity as a jurisdictional barrier to a breach of contract action arising off-reservation and brought in state court. Those decisions, without exception, focus on the preconstitutional sovereign status of the tribes and on the federal trust responsibility of preserving tribal assets from dissipation through litigation, and draw no distinction based on the situs of the claim.¹¹ See, e.g., *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509-10 (1991); *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering Co.*, 476 U.S. 877, 890-91 (1986); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56-58 (1978); *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 512 (1940). Indeed, in *Puyallup Tribe, Inc. v. Dep't of Game*, 433 U.S. 165 (1977), this Court held that tribal immunity barred state jurisdiction over a tribe arising out of the tribe's exercise of treaty-reserved fishing rights on and off the reservation. *Id.* 433 U.S. at 172-73. In *Citizen Band Potawatomi*, this Court recognized that tribal immunity bars an action for monetary damages against a tribe. *Id.* 498 U.S. at 509-11.

At least five federal circuits have interpreted this Court's articulation of the tribal sovereign immunity doctrine as

¹¹ In *Hoover v. Kiowa Indian Tribe of Oklahoma*, 909 P.2d 59, 61 (Okl. 1995), cert. denied, ___ U.S. ___, 116 S.Ct. 1675 (1996), the Oklahoma Supreme Court relied upon the statement of this Court in *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973), that "[a]bsent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State." *Id.* 411 U.S. at 148-49. However, *Mescalero* does not mention tribal immunity from suit, and, as recognized by this Court in *Citizen Band Potawatomi*, the legal applicability of a state law to an Indian tribe is a distinct and separate issue from the ability of the state to enforce compliance. *Id.* 498 U.S. at 514.

extending to tribal commercial activities and/or to tribal conduct off-reservation. In *Maynard v. Narragansett Indian Tribe*, 984 F.2d 14 (1st Cir. 1993), the First Circuit held that tribal sovereign immunity barred state jurisdiction over trespass actions against the Tribe arising off-reservation.

In *Maryland Cas. Co. v. Citizens Nat. Bank of West Hollywood*, 361 F.2d 517, 521 (5th Cir.), cert. denied, 385 U.S. 918 (1966), the Fifth Circuit held that tribal immunity is available to bar an action arising out of tribal commercial activities in the same manner as to a tribe generally, because "[i]t is in such enterprises and transactions that the Indian tribes and Indians need protection."

In *American Indian Agricultural Consortium v. Standing Rock Sioux Tribe*, 780 F.2d 1374, 1378 (8th Cir. 1985), the Eighth Circuit held that tribal immunity barred jurisdiction over a breach of contract action, emphasizing the fact that immunity is "necessary to promote tribal self-determination, economic development, and cultural autonomy."

In *Pan American Co. v. Sycuan Band of Mission Indians*, 884 F.2d 416, 419 (9th Cir. 1989), the Ninth Circuit held that tribal immunity barred jurisdiction over a breach of contract action arising out of a bingo agreement with the Band, noting that "[c]onsent [to suit] by implication, whatever its justification, still offends the clear mandate of Santa Clara Pueblo." Also, in *In re Greene*, 980 F.2d 590, 596 (9th Cir. 1993), cert. denied sub nom., *Richardson v. Mt. Adams Furniture*, 510 U.S. 1039 (1994), the Ninth Circuit held that tribal immunity barred suit by a bankruptcy trustee against a furniture business owned by a tribe arising out of an off-reservation transaction, citing this Court's continuous and broad reaffirmation of the tribal immunity doctrine as requiring recognition that tribal immunity under federal common law contains an "extraterritorial component."

Most notably, for the purposes of this case, the Tenth Circuit, in *Sac and Fox Nation v. Hanson*, 47 F.3d 1061 (10th Cir.), *cert. denied*, ___ U.S. ___, 116 S.Ct. 57 (1995), held that tribal immunity bars state court jurisdiction over third party claims for damages brought by employees of a former manufacturing plant operated by the Nation off-reservation, and that the location of tribal commercial activity cannot be determinative of whether a tribe is entitled to immunity because "the point of sovereign immunity ... is the power of self-determination." *Id.*, 47 F.3d at 1064 (quoting *Bank of Oklahoma v. Muscogee (Creek) Nation*, 972 F.2d 1166, 1169 (10th Cir. 1992)); *see also Ramey Const. Co. v. Apache Tribe*, 673 F.2d 315, 320 (10th Cir. 1982)(upholding dismissal of breach of contract action on tribal immunity grounds).

The rule on tribal immunity is settled law in the federal courts. Further, the *Padilla* and *Hoover* decisions are not representative of state court understandings of the doctrine. *See, e.g., Gavle v. Little Six, Inc.*, 555 N.W.2d 284, 292-96 (Minn. 1996)(recognizing immunity of tribal corporation for civil claims partially arising off-reservation); *In re Ransom v. St. Regis Mohawk Education & Community Fund, Inc.*, 86 N.Y.2d 553, 560, 658 N.E.2d 989, 993, 635 N.Y.S.2d 116, 120 (1995)(immunity extends to a tribally-owned nonprofit corporation chartered under state law); *C & B Investments v. Wisconsin Winnebago Health Dept.*, 198 Wis. 105, ___, 542 N.W.2d 168, 170 (Wis. Ct. App. 1995)(immunity extends to tribal health board in breach of contract action); *North Sea Prods., Ltd. v. Clipper Seafoods Co.*, 595 P.2d 938, 941 (Wash. 1979)(immunity bars state garnishment action against tribe despite tribal commercial activity off-reservation); *People v. LeBlanc*, 399 Mich. 31, ___, 248 N.W.2d 199, 212-13 (1976)(tribe immune from state regulation of treaty-reserved fishing off-reservation); *State v. Gurnoe*, 53 Wis.2d

390, ___, 192 N.W.2d 892, 902 (1972)(same); *White Mountain Apache Tribe v. Shelley*, 107 Ariz. 4, 7, 480 P.2d 654, 657 (1971)(immunity extends to tribally-owned business); and *Morgan v. Colorado River Indian Tribe*, 443 P.2d 421, 423 (Ariz. 1968)(immunity applies to claims arising from accident at tribally-owned amusement park off-reservation).¹² The rationale of the *Hoover* decision, and of the Oklahoma Court of Appeals in the present case, are at odds with the observance of the immunity doctrine in other states. Indeed, it is the view of the Fond du Lac Band that this case, when considered in the overall context of the generally litigious posture towards tribes by the State of Oklahoma, is indicative of a fundamental intolerance of tribal existence itself.

III. THE APPLICABILITY OF THE TRIBAL IMMUNITY DOCTRINE TO TRIBAL CONTRACTUAL RELATIONSHIPS INVOLVING OFF-RESERVATION PERFORMANCE IS ESSENTIAL TO THE MAINTENANCE OF TRIBAL SELF-GOVERNMENT AND TO THE FULFILLMENT OF THE FEDERAL TRUST RESPONSIBILITY TO PRESERVE TRIBAL ASSETS.

¹² *Contra Dixon v. Picopa Const. Co.*, 160 Ariz. 251, ___, 772 P.2d 1104, 1107-10 (1989)(tribally-owned corporation governed by a tribally-elected board of directors deemed to be too far removed from tribal control to benefit from immunity). For a critique of the *Dixon* and *Padilla* decisions, *see Dietrich, Tribal Businesses and the Uncertain Reach of Tribal Sovereign Immunity: A Statutory Solution*, 67 Wash. L. Rev. 113, 124-27 (1997).

Tribal sovereign immunity, and the purposes underlying the immunity doctrine, cannot be limited to the on-reservation or governmental functions of the tribe without seriously impairing the ability of tribes to maintain any appreciable degree of autonomy or self-determination. As recognized by this Court in *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering Co.*, 476 U.S. 877 (1986), "[t]he common law sovereign immunity possessed by the Tribe is a necessary corollary to Indian sovereignty and self-governance." *Id.*, 476 U.S. at 891. The real success of the immunity doctrine in achieving these federal policy purposes is not found in the cases arising in which tribal immunity is raised as a jurisdictional defense, but in the doctrine's deterrent effect of discouraging the multitude of claims that would otherwise be brought. Without the benefit of immunity, tribal self-government and economic development would be undermined by an endless stream of claims against tribal resources grounded in state law and pleaded in off-reservation courts.

The preservation of the tribal immunity doctrine is essential to tribal survival because the continued vitality of tribes depends upon their ability to maintain their measured separateness without converting reservations to detention areas outside of which tribes dare not venture for fear of loss of their sovereign identity. Meaningful tribal self-determination requires that tribes have the ability to conduct business with the outside world without becoming subordinate to and assimilated by the laws of the dominant culture. This is the essential promise by the United States to the tribes, in every treaty and statute: "we will protect you against extinction." And, as Justice Black stated: "Great nations, like great men, should keep their word." *Federal Power Comm'n v.*

Tuscarora Indian Nation, 362 U.S. 99, 142 (1960)(Black, J., dissenting).

IV. PARTIES TO CONTRACTS WITH INDIAN TRIBES HAVE WHATEVER RIGHTS AND REMEDIES AS ARE RESERVED UNDER THE CONTRACT DOCUMENTS.

Parties to contractual relationships with Indian tribes are not at a legal disadvantage or disability simply because the legal rules applicable to such transactions reside in a specialized area. A contract between an Indian tribe and an off-reservation business is not unlike a transaction between any two parties in a market economy: both parties are presumed to negotiate the transaction with their "eyes open," and are each responsible for researching the merits and contingencies of a proposal, and for obtaining the appropriate professional advice before entering into a contract. To the extent that legal advice is sought in connection with a proposed transaction, the rules of professional conduct for attorneys universally require a lawyer to render competent representation, which includes the responsibility to provide "the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." American Bar Association, *Model Rules of Professional Conduct* Rule 1.1 (1983). The rule of competence further requires an attorney to recognize whether it is necessary "to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question." *Id.*, Comment 1.

The unique rules governing Indian law generally, and the tribal immunity doctrine in particular, are the law of the land, and are the basis of settled expectations by the tribes, federal

and state governments, and members of the business community. The Oklahoma and New Mexico courts have attempted to restate the rules regarding tribal immunity in a manner which directly contravenes two centuries of federal common law. The Kiowa Tribe is presently bearing the burden of their experiment. However, such a drastic change in tribal immunity law is neither necessary or desirable, and poses a direct challenge to the exclusivity of federal control over Indian affairs in our Nation.

"Tribes and persons dealing with them long have known how to waive sovereign immunity when they so wish." *American Indian Agricultural Consortium v. Standing Rock Sioux Tribe*, 780 F.2d 1374, 1379 (8th Cir. 1985). A business that is pursuing a particular transaction with a tribe may negotiate an express waiver of tribal immunity as a condition of the transaction, and the tribe will presumably decide whether the particular proposal is important enough to tribal interests to grant such a waiver. If a waiver had been negotiated as part of the contract at issue in the present case, this case would not have been necessary. Because the Kiowa Tribe has the authority to waive its immunity in a contract, it is in the negotiation and language of the contract at issue in the present case that the question of a waiver should have been addressed. If a waiver had been granted, immunity would not have been unavailable as a jurisdictional defense by the Tribe in connection with that contract, and this case would not have been necessary. However, Manufacturing Technologies, Inc. did not insist on a waiver as part of the transaction, and in fact agreed to a deal which expressly reserved the sovereign rights of the Tribe. The sovereign rights of the Kiowa Tribe which were expressly reserved in the promissory note at issue are reserved under federal statutory and common law, and include the right to assert sovereign immunity against the unconsented

operation of state law upon the Tribe. For this Court to make further inquiry into this matter would depart from the cardinal principle of contract law that "the meaning of a contract must be determined from the four corners of the instrument." 17A C.J.S. *Contracts* § 296(2)(1963).

The Fond du Lac Band is a party to contracts with off-reservation businesses amounting to several million dollars a year. It has been the experience of the Band that attorneys representing those businesses are aware of the tribal immunity doctrine, and either negotiate the terms for a waiver of immunity, or secure alternative remedies, within the contract. There are no secrets or surprises, only a unique body of law reflecting the unique legal status of the Band as a federally recognized Indian tribe. A radical change in the law on tribal immunity would severely disrupt settled law and expectations.

A recent article in a northern Minnesota business publication concerning the conduct of business between a tribe and off-reservation vendors stated:

Nearly every business transaction is the product of some negotiation. Because a tribal government may waive its sovereign immunity, a non-tribal business seeking to supply goods or services under contract may try to negotiate a provision that may be open to linking dispute resolution in a tribal court using a specified legal framework, specified by the UCC or some other common body of business law ...

Doing business with tribes requires adjusting to unfamiliar rules. It also may require submitting

disputes to a tribal court. Don't let that be a barrier. Instead, take care to ensure dispute resolutions are spelled out in the contract, and understood by all parties at the onset.

John D. Kelly, "Doing Business with Indian Tribes," *Business North*, August 1997, p. 13.

The point is, the tribal immunity doctrine works as an instrument of achieving the purposes of federal Indian policy, but needn't constitute an obstacle to a fairly negotiated contractual quid pro quo, provided that the parties to contracts with tribes are diligent in the protection of their own interests; however, in the event that they are not attentive to the unique legal status of the tribes, it is not an appropriate or desirable function of federal law or of this Court to protect them from their own deals.

CONCLUSION

Tribal sovereign immunity is exclusively governed by federal law. The State of Oklahoma's denial of the availability of tribal immunity as a jurisdictional defense by the Kiowa Tribe in this case is contrary to the overwhelming weight of federal authority, including numerous precedents of this Court. Further, a limitation of the immunity doctrine at this late time to commercial disputes arising in tribal territory would contravene the federal policy of promoting tribal self-determination and economic development, and would interfere with the settled expectations of the tribes and parties doing business with tribes by over a century of federal precedent. The appropriate place to address the tribal immunity issue in commercial dealings is in the negotiation and structure of individual contracts.

For these reasons, the decision of the Oklahoma Court of Appeals in this matter should be reversed.

Respectfully submitted,

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